162 U.S. 625

162-625

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~944~~. 597

ALEX. W. CRAIN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

FILED MARCH 14, 1895.

(15,828.)

(15,828.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 944.

ALEX. W. CRAIN, PLAINTIFF IN ERROR,

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 16, 1895.

a UNITED STATES OF AMERICA,
Western District of Arkansas.

Pleas and proceedings before the Honorable Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas, in case of—

UNITED STATES
vs.
ALEX. W. CRAIN, } Indictment for Forgery, &c. No. 4866.

1 UNITED STATES OF AMERICA,
Western District of Arkansas.

In the District Court, Aug. Term, A. D. 1894.

UNITED STATES
versus
ALEX. W. CRAIN. } Forgery and Presenting False Claims.

The grand jury of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present—

That Alex. W. Crain on the 4th day of August, A. D. 1892, at the Creek Nation, in the Indian country, within the western district of Arkansas aforesaid, unlawfully, feloniously, and knowingly did falsely make, forge, and counterfeit, and cause to be made, forged, and counterfeited, the instrument of writing hereinafter set out, the same being a declaration for an invalid pension and being in words and figures as follows:

2 Act of June 27, 1890.

Declaration for Invalid Pension.

This application may be executed before a clerk of court, notary, or justice of the peace.

STATE OF INDIAN TERR'Y,
County of Seminole Nation, } ss:

On this 4th day of August, one thousand eight hundred and ninety-two, personally appeared before me, a U. S. commissioner within and for the county and State aforesaid, Spahiga, aged 57 years, a resident of ——, in the county of Creek Nation, State of Indian Territory, who, being duly sworn according to law, declares that he is the identical Spahiga who was enrolled on the 12th day of August, 1863, in (here state rank, company, and regiment in military service, or vessel if in navy) Co. D, 1st Regiment Indian Home Guard Vols., in the service of the United States in the war of the rebellion; that he served at least ninety days of May, 1865; that in addition to the above services he also served as follows (here state

what the service was, giving company and regiment or vessel, and give dates of enlistment and discharge), none; that he has not been employed in the military, naval, or marine service of the United States since the 31st day of May, 1865.

That he has not been employed in the military or naval service otherwise than as above stated; that he is unable to earn a support by manual labor by reason of (here name the disease or injuries from which now disabled, whether contracted in the service or since discharged) spinal disease, neuralgia, rheumatism, disease of eyes, and catarrh.

3 That said disabilities are not due to vicious habits, and are, to the best of his knowledge and belief, permanent; that he has not applied for pension under application No. —; that he is a pensioner under certificate No. —. (If a pensioner, the certificate number need only be given. If not, give the number of the former application, if one was made.)

That he makes this declaration for the purpose of being placed on the pension-roll of the United States under the provisions of the act of Congress of June 27, 1890. He hereby appoints, with full power of substitution and revocation, David L. Gitt, Washington, D. C., his true and lawful attorney to prosecute his claim, the fee to be ten dollars, as prescribed by law.

That his post-office address is Arbeka, county of Seminole Nation, State of Indian Terr'y.

his
SPAHIGA x
mark.

H. G. MALOT.
W. M. RENTON.
(Two witnesses who write sign here.)

Also personally appeared Pahose Marrel, residing at Creek Nation, Ind. Ter., and Nokos Fixico, residing at Creek Nation, Ind. Ter., persons whom I certify to be respectable and entitled to credit, and who, being by me duly sworn, say that they were present and saw Spahiga, the claimant, sign his name (or make his mark) to the foregoing declaration; that they have every reason to believe, from the appearance of said claimant and their acquaintance with him for 30 years, respectively, that he is the identical person he represents himself to be, and they have no interest in the prosecution of this claim.

his
PAHOSE x MARREL.
mark.
his
NOKOS x FIXICO.
mark.
(Signatures of witnesses.)

H. G. MALOT.
W. M. RENTON.

4 Sworn to and subscribed to before me this 4th day of August, A. D. 1892, and I hereby certify that the contents of the

above declaration, &c., were fully made known and explained to the applicant before swearing, including the words ——, erased, and the words ——, added, and that I have no interest, direct or indirect, in the prosecution of this claim.

[L. S.] A. W. CRAIN,
(Signature.)
U. S. Comm'r, Pension Notary.
(Official character.)

The act of June 27, 1890, requires, in case of a soldier:

1. An honorable discharge (but certificate need not be filed unless called for).
2. A minimum service of ninety days.
3. A permanent physical disability not due to vicious habits. (It need not have originated in the service.)
4. The rates under the act are graded from $6 to $12, proportioned to the degree of inability to earn a support, and are not affected by rank held.
5. A pensioner under prior laws may apply under this one, or a pensioner under this one may apply under other laws, but he cannot draw more than one pension for the same period.

(Pension Office.)

(Endorsed on back:) Act of June 27, 1890. Soldier's application. Name: Spahiga. Service: Co. D, 1st Reg. Indian Home Guard Vols. Filed by David L. Gitt, Washington, D. C.

5 UNITED STATES OF AMERICA,
Western District of Arkansas.

In the District Court, —— Term, A. D. 189–.

UNITED STATES
versus
—— ——.

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present—

That —— ——, on the — day of ——, A. D. 189–, at the —— Nation, in the Indian country, within the western district of Arkansas aforesaid, — for the purpose fraudulently to obtain money from the United States and for the purpose of using the said forged instrument in a pension claim before the Commissioner of Pensions, at Washington, D. C., and for the purpose of defrauding the United States of money, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

6 *2nd Count. Forgery and Making and Presenting False Charges Against the Government.*

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of

the western district of Arkansas aforesaid, upon their oath present—

That heretofore, to wit, on the 4th day of August, A. D. 1892, one Spahiga is alleged to have executed a certain declaration and affidavit; said declaration and affidavit are in words and figures as set out in the first count of this indictment, and said declaration and affidavit purporting to be executed before one A. W. Crain, U. S. commissioner in the Creek Nation, in the Indian Territory, the said Spahiga claiming is said declaration a pension from the United States as soldier of war of rebellion, who in said declaration was alleged to have enlisted under the name of Spahiga, at ——, on the 12 day of Aug., 1863, Company D, 1st Reg. Indian Home Guards, Indian Territory; in the war of the rebellion; said declaration and affidavit, after being so made, executed, and falsely counterfeited and forged by said Alex. W. Crain was by said Alex. W. Crain forwarded, with intent to defraud the United States and to obtain certain money from the United States, to the office of the Commissioner of Pensions, in the Department of the Interior, at the city of Washington, in the District of Columbia, where the same was duly filed on the 12 day of Aug., 1892, as a claim against the Government of the United States for a pension by the said Spahiga, as soldier aforesaid, as aforesaid, and being so filed for approval by the said A. W. Crain, in the office aforesaid, by the Commissioner of Pensions, and the said affidavit and declaration being material on the question pending be-
7 fore said Commissioner of Pensions as to whether the said Spahiga was by the laws of the United States entitled to a pension.

And the jurors aforesaid upon their oaths aforesaid do further present that on the 4 day of August, 1892, at the Creek Nation, Indian Territory, and within the western district of Arkansas, at which date said declaration, affidavit, and claims were prepared and made for filing in the office of the Commissioner of Pensions, as aforesaid, the same being an office of the United States, for the purpose aforesaid, one Alex. W. Crain did make, execute, and forge and cause to be made, executed, and forged a certain pretended and false affidavit, or the same may be called a certificate, the same being one and the same paper, and being in form and substance as hereinafter set out, which said forged, false, and counterfeited affidavit or certificate was fraudulent and was a part of the said declaration and affidavit above mentioned, and was forwarded, together with the said declaration, to the office of the Commissioner of Pensions aforesaid for the purpose of defrauding the United States and of aiding and abetting the said Spahiga to obtain the approval of the said Commissioner of Pensions to his said claim for a pension as aforesaid, for the purpose of aiding the said Spahiga fraudulently to obtain money from the United States; which said pretended and false affidavit and certificate is in substance set out in the first count of this indictment.

That said pretended affidavit and certificate and declaration was forged, false, and fraudulent, and did contain fraudulent and fictitious statements, as the said A. W. Crain well knew, in this: That

Pahose Marrell, Spahiga, and Nokos Fixico did not sign said pretended affidavit and certificate, declaration and affidavit, as set forth in said false certificate and affidavit, and said Pahose Mar-
8 rell, Spahiga, and said Nokos Fixico were not sworn as to the truth of the matters and things set forth in said pretended declaration, affidavit, and certificate, but in truth and fact the said A. W. Crain did knowingly and wilfully, feloniously and falsely, make, counterfeit, forge, and cause to be made, counterfeited, and forged the names of Pahose Marrell, Spahiga, and Nokos Fixico to and upon the said false and forged affidavit and certificate with intent to defraud the United States and to aid the said Spahiga in obtaining money fraudulently from the United States, and that the said A. W. Crain did not swear the said Pahose Marrell, said Spahiga, and the said Nokos Fixico as to the truth of the matters and things set forth in said declaration, affidavit, — certificate, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

3rd Count.

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present that A. W. Crain, on the 4 day of Aug., A. D. 1892, at the Creek Nation, in the Indian country, within the western district of Arkansas aforesaid, unlawfully and feloniously did transmit to the office of the Commissioner of Pensions of the United States, the same being an office under the Government of the United States, and for the purpose of defrauding the United States, the false and forged instrument of writing set out in the first count of this indictment, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

JAS. F. READ,
U. S. Dist. Att'y, West. Dist. of Ark.

(Endorsed on back:) United States *vs.* Alex. W. Crain. Forgery. A true bill. S. A. Williams, foreman. Witnesses, Nokos Fixico, Spahiga, Pahose Marrell, Wm. M. Renton, F. P. Boushee. Filed in open court Oct. 24, 1894. S. Wheeler, clerk.

9 *Record Entries.*

In the District Court of the United States for the Western District of Arkansas, Nov. Term, 1894.

FRIDAY MORNING, 8½ O'CLOCK, *Nov.* 7, 1894.

Court met pursuant to adjournment.

Present: The Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES vs. A. W. CRAIN. } Indictment for Forgery & Presenting False Claims. No. 4866.

On this day come the United States of America, by Jas. F. Read, Esq., attorney for the western district of Arkansas, and come- the said defendant, in his own proper person and by his attorney, Wm. M. Mellette, Esq., and on motion of plaintiff, by its attorney, it is ordered by the court that a jury come to try the issue joined; whereupon the following were selected for the trial of this cause, to wit, Damon A. Coger, Isaac A. Campbell, Enos P. Mills, Jno. H. Cooper, Thos. N. Daugherty, Franklin Maxey, Isaac J. Cruce, Wm. A. Dover, Reuben Mathews, Johnson Crawford, Jno. F. Eads, Jno. L. McConnell, twelve good and lawful men of the district aforesaid, duly selected, empaneled, and sworn to try the issue joined and a true verdict render according to the law and the evidence, and, after hearing the evidence and argument of counsel and receiving the charge of the court, retired to consider of their verdict, and after a short time returned into court the following verdict, to wit:

"We, the jury, find the defendant, A. W. Crain, guilty as charged in the first, second, and third counts of the within indictment."

(Signed) J. L. McCONNELL, *Foreman.*

Whereupon, by order of the court, the jury was discharged from the further consideration of the case and the said defendant committed to the custody of the marshal to await final sentence.

MONDAY, *Nov.* 12, 1894.

(Caption omitted.)

On this day come- the said defendant, by his attorney, and files his motion for arrest of judgment herein.

FRIDAY, *Dec.* 28, 1894.

(Caption omitted.)

The motion heretofore filed for arrest of judgment herein is sustained as to 1st & 3rd counts and overruled as to 2nd count.

TUESDAY, *Jan.* 22, 1895.

(Caption omitted.)

Now comes defendant, Alex. W. Crain, by his attorney, Wm. M. Mellette, Esq., and tenders this his bill of exceptions in the above-entitled cause and asks that the same be signed and made a part of the record in this case, which is accordingly done.

Also at the same time presents his assignment of errors, which is ordered filed.

Also at same time presents his petition asking for writ of error to the Supreme Court of the United States, which petition is ordered filed and writ of error ordered issued.

11 In the District Court of the U. S. for the Western District of Arkansas, Nov. Term, 1894.

FRIDAY MORNING, 8½ o'CLOCK, *Dec.* 28, *A. D.* 1894.

Court met pursuant to adjournment.

Present: The Honorable Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES *versus* A. W. CRAIN. } No. 4866. Indictment for Forgery, &c., in the Indian Country.

On motion of Jas. F. Read, Esq., attorney for the western district of Arkansas, the said defendant, A. W. Crain, was brought to the bar of the court in custody of the marshal of said district, and, it being demanded of him what he has or can say why the sentence of the law upon the verdict of guilty (2nd count) heretofore returned against him by the jury in this cause on the 9th day of Nov., A. D. 1894, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon, the premises being seen and by the court well and sufficiently understood, it is considered by the court here that the said A. W. Crain, for his felony aforesaid, be imprisoned in the house of correction situated at Detroit, in the eastern district of Michigan, for the term and period of three (3) years from this date at hard labor, and that he pay to the United States of America all their costs in and about this prosecution laid out and expended, and that they have execution therefor.

It is further considered that the marshal of the western district of Arkansas, to whose custody the said A. W. Crain is now here committed, receive and safely keep and convey the body of the said A. W. Crain hence to said house of correction, in the State of Michigan, without delay, and deliver him to the custody of the keeper of said house of correction, who will receive and safely keep the said A. W. Crain in jail in execution of the sentence aforesaid, and in conformity with the same for the full period of the time aforesaid; and it is further ordered that the clerk of this court furnish the marshal of this district with two duly certified copies of this judgment, sentence, and order, one of which shall be delivered to the keeper of said house of correction and the other returned by the marshal to this court, with a full and true account of the execution of the same.

I, Stephen Wheeler, clerk of the district court of the United States in and for the western district of Arkansas, hereby certify that the foregoing is a true and correct copy of the judgment, sentence, and order in the above-entitled cause as the same appears of record.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Fort Smith, in said district, this — day of ——, A. D. 189–.

——— ———, *Clerk*,
By ——— ———, *D. C.*

[Endorsed:] United States *versus* A. W. Crain. Mittimus. Detroit, 3 y'rs' sentence.

Received at the house of correction in Detroit, State of Michigan, this — day of ——, A. D. 189–, from —— ——, marshal of the United States for the western district of Arkansas, the body of the within-named defendant, —— ——, together with a copy of this writ.

—— ——.

I certify that I have served the within writ by delivering the within-named —— ——, together with a copy of this writ, into the custody and hands of the superintendent of the house of correction at Detroit, in the State of Michigan, on the — day of ——, 189–, and have his receipt therefor endorsed thereon as within I am commanded.

—— ——,
United States Marshal for Western District of Arkansas.

12 *Bill of Exceptions.*

In the District Court of the United States for the Western District of Arkansas.

UNITED STATES *vs.* ALEX. W. CRAIN. } Forgery and Presenting False Claims. No. 4866.

Be it remembered that on the — of November, 1894, the same being a day of the November term of the United States district court for the western district of Arkansas, came on to be heard the above-entitled cause, when the following proceedings were had, to wit:

Twelve good and lawful men, who answered questions which qualified them to sit as jurors in this case, were duly empaneled, sworn, and charged to try the issues joined in the above-entitled cause and returned into court the following verdict:

"We, the jury, find the defendant, A. W. Crain, guilty as charged in the first, second, and third counts of the within indictment."

Whereupon the defendant filed his motion in arrest of judgment and to set aside the verdict; which said motion is as follows:

In the District Court of the United States for the Western District of Arkansas.

UNITED STATES *vs.* A. W. CRAIN. } Forgery and Presenting False Claims. No. 4866.

Now comes the defendant and moves the court to arrest the judgments on the verdict of the jury rendered on the three counts herein for the following reasons, and to set aside said verdicts:

13 First. Because the first count of the indictment upon which said verdict was rendered is defective in substance, in this,

that it does not state in what particular the affidavit, declaration, or certificate set forth therein is false and forged and traverses the same.

2nd. Because said indictment does not state which declaration, certificate, or affidavit therein set forth is false, there being two such documents.

3rd. Because the first count of said indictment does not allege that defendant knew that the document set forth therein was false.

4th. Because said first count charges no act which is a crime or misdemeanor under the laws of the United States.

5th. Because the second count in said indictment is double, containing and including three distinct offenses therein, to wit: That the defendant forwarded to the Pension Department of the United States two separate and distinct affidavits or declarations or certificates for the purpose of defrauding the United States, and that the defendant did falsely make, counterfeit, and forge and cause to be made, counterfeited, and forged a certain pretended and false affidavit or certificate for the purpose of defrauding the United States and obtaining money from the United States.

6th. Because the second count of said indictment does not set out with sufficient certainty the affidavit, certificate, or declaration alleged therein to have been falsely made, forged, and counterfeited and unlawfully forwarded to the office of the Commissioner of Pensions.

7th. Because the said count is not complete within itself, but in an indefinite and uncertain manner refers to a document contained and set forth in the first count of said indictment.

14 8th. Because the 2nd count of said indictment is indefinite and misleading, in this, that it alleges that the names of Pahose Mahlah, Spahiga and Nocus Fixico were forged to one and the same document, as set out in the first count of the indictment, which is not a fact.

9th. Because said second count does not state in what particular the affidavit or declaration or certificate set out therein is false and was forged.

10th. Because the said 2nd count does not in a legal manner charge any offense against the laws of the United States.

11th. Because the third count of said indictment is defective in substance, in this, that it does not state in what particular the affidavit or instrument of writing therein referred to as being set out in the first count of said indictment is false and forged.

12th. Because the reference made in said 3rd count to an instrument of writing set forth in the first count is indefinite and uncertain.

13th. Because said third count does not state which instrument of writing set forth in the first count was unlawfully forwarded to the Pension Office.

14th. Because the 3rd count of said indictment does not state that the defendant knew that the instrument of writing alleged to have been unlawfully forwarded to the Pension Office was false and forged.

15th. Because said third count charges no act which is a crime under the laws of the United States.

Wherefore defendant prays that he be discharged.

A. W. CRAIN,
By BARNES & MELLETTE AND
BARNES & RUTHERFORD,
His Att'ys.

(Endorsed on back:) Filed in open court Nov. 12, 1894. S. Wheeler, clerk.

15 And, said motion coming on to be heard, the court sustained said motion as to the first and third counts of said indictment and overruled said motion as to the second count of said indictment.

To which action of the court in overruling said motion as to the second count of said indictment the defendant then and there excepted.

Whereupon the court sentenced the defendant to three years' imprisonment upon his conviction upon the second count of said indictment; to which judgment and sentence of the court defendant then and there excepted, and now tenders this his bill of exceptions and prays that the same be signed and made a part of the record in this case.

I. C. PARKER,
U. S. Dist. Judge, West. Dist. Arkansas.

(Endorsed on back:) Filed Jan'y 22, 1895. S. Wheeler, clerk, by I. M. Dodge, D. C.

16 In the District Court of the United States for the Western District of Arkansas.

UNITED STATES
vs.
ALEX. W. CRAIN. } Forgery and Presenting False Claims.

The defendant in the above-entitled cause files this his assignment of errors committed in the trial hereof.

It was error in the court to overrule defendant's motion in arrest of judgment upon the conviction upon the second count of the indictment herein, which motion is set out in full in the bill of exceptions filed herein.

Second. It was error in the court to render judgment against defendant upon the verdict of guilty upon the second count of said indictment and to sentence defendant to imprisonment thereon.

BARNES & MELLETTE,
Attorneys for Defendant.

(Endorsed on back:) Filed Jan'y 22, 1895. S. Wheeler, clerk, by I. M. Dodge, D. C.

17 In the District Court of the United States for the Western District of Arkansas.

UNITED STATES *vs.* A. W. CRAIN. } Forgery & Presenting False Claims. No. 4866.

To the clerk of the district court of the United States for the western district of Arkansas:

Your petitioner respectfully represents that at the Nov. term, A. D. 1894, of this court he was convicted on an indictment charging him with the crime of forgery and presenting a false claim, and that the said court has pronounced judgment and sentence of imprisonment in the penitentiary upon this petitioner upon the verdict of the jury convicting him as aforesaid. Your petitioner alleges that in the record and proceedings in the trial in said cause there is great and manifest error, to the prejudice and great damage of your petitioner.

He therefore prays that a writ of error from the Supreme Court of the United States be issued by you, under the seal of said dist. court, in said cause, removing said cause and records therein to the said Supreme Court, in order that the same may be there examined, and, if error be found, that the judgment and sentence against him therein may be reversed.

A. W. CRAIN.
BARNES & MELLETTE,
His Attorneys.

18 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the district court of the United States for the western dist. of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you or some of you, between The United States, plaintiff, and Alex. W. Crain, defendant, a manifest error hath happened, to the great damage of the said Alex. W. Crain, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right

and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 23 day of January, in the year of our Lord one thousand eight hundred and ninety-five.

STEPHEN WHEELER,
Clerk of the United States Dist. Ct. for Western Dist. of Ark.,
By I. M. DODGE, *D. C.*

Allowed by—

I. C. PARKER,
Justice of the Supreme *Court of the United States.*

19 The United States of America to Jas. F. Read, Esq., U. S. district attorney for the western district of Arkansas, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, 30 days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Arkansas, wherein Alex. W. Crain — plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Isaac C. Parker, judge of the circuit court of the United States for the western district of Arkansas, this 23 day of January, in the year of our Lord one thousand eight hundred and ninety-five.

I. C. PARKER,
United States District Judge for the Western District of Arkansas.

I hereby accept service of the within citation this 23rd day of January, 1895.

JAS. F. READ,
U. S. Att'y.

20 UNITED STATES OF AMERICA, }
Western District of Arkansas. }

I, Stephen Wheeler, clerk of the district court of the United States for the western district of Arkansas, in the eighth circuit, hereby certify that the foregoing transcript, annexed to this certificate, is a true and complete copy of the record & proceedings in the case of U. S. *vs.* Alex. W. Crain, the original of which remains of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Fort Smith, in said district, this 24 day of January, A. D. 1895.

{ The Seal of the District Court, U. S. A., Fort Smith, Western District of Ark. }

S. WHEELER, *Clerk*,
By I. M. DODGE, *D. C.*

Endorsed on cover: Case No. 15,828. W. Arkansas D. C. U. S. Term No., 944. Alex. W. Crain, plaintiff in error, *vs.* The United States. Filed March 14, 1895.

Office Supreme Court U.S.
FILED.
DEC 30 1895
JAMES H. McKENNEY,
CLERK.

.....IN THE.....

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1895

No. ~~944~~. 957

ALEX. W. CRAIN, Plaintiff in Error,
vs.
THE UNITED STATES.

MOTION TO ADVANCE.

.....IN THE.....

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1895

No. 944.

ALEX. W. CRAIN, Plaintiff in Error,
vs.
THE UNITED STATES.

MOTION TO ADVANCE.

This case is a writ of error from the judgment of the District Court of the United States, for the Western District of Arkansas, sentencing plaintiff in error, to imprisonment in the House of Correction, Detroit, Michigan, for the period of three years, upon the second count of the indictment, as shown by the record.

Under the provisions of rule twenty-six, of this court, I respectfully move the court to advance the case upon the docket, and set the same down for hearing at some time during the present term.

The questions involved in this case are, as to the sufficiency, of the second count of the indictment, to sustain a judgment and sentence, the trial court holding, upon motion in arrest, that it was sufficient.

Said second count undertakes to charge defendant with the crimes of Forgery, and Presenting False Claims, &c., in violation of the pension laws of the United States.

The assignment of errors herein alleges that said second count does not charge an offence against the laws of the United States, and that its allegations are so uncertain, that plaintiff in error could not plead his conviction herein as a bar to further criminal prosecution growing out of the same transaction.

This motion is made for the reason that the plaintiff in error, is now undergoing his sentence in the House of Correction, and if there is error presented in the record, he should have the benefit of it.

Notice of this motion has been served on the proper officer of the government, and proof of service is filed with the clerk of this court.

A. H. GARLAND, and
A. H. Garland For Plaintiff in Error.

FILED
FEB 24 1896
JAMES H. McKENNEY,
CLERK.

.....IN THE.....

SUPREME COURT OF THE UNITED STATES,

Case No. ~~9777~~ 5557

OCTOBER TERM. 1895.

ALEX. W. CRAIN, Plaintiff in Error,

vs.

THE UNITED STATES.

In Error to the District Court of the United States, Western District of Arkansas.

A. H. GARLAND, & R. C. GARLAND,

Attorneys for Plaintiff in Error.

PRESS OF
RUTLEDGE-HIGGINS PUBLISHING COMPANY,
FORT SMITH, ARK.

.....IN THE.....

SUPREME COURT OF THE UNITED STATES,

Case No. 944.

OCTOBER TERM. 1895.

ALEX. W. CRAIN, Plaintiff in Error,

vs.

THE UNITED STATES.

In Error to the District Court of the United States, Western District of Arkansas.

STATEMENT.

Upon the 24th of October, 1894, in the District Court of the United Statesf for the Western District of Arkansas, an indictment was returned against the plaintiff in error, and upon the 7th day of November, of the same year, he was put upon trial. Said indictment, which is set out in full in the printed record, consists of three

counts, and undertakes to charge plaintiff in error, with forgery and presenting false claims, &c., in violation of the pension laws of the United States. He was convicted upon each of the three counts. Thereupon he filed his motion in arrest of judgment, which was sustained as to the first and third counts, and overruled as to the second. Upon the 28th of December, 1894, the court sentenced plaintiff in error to imprisonment in the House of Correction, Detroit, Michigan, for the period of three years, and he has been confined there since a shrort time after the date of sentence, all of which will appear by the printed record.

A statement of the facts of the case as shown by the proof, would not properly have a place here, as the errors assigned apply wholly to the sufficiency of the second count of the indictment to sustain a conviction. The offense charged against plaintiff in error, is alleged to have occurred in the Seminole Nation, Indian Territory, about two hundred miles from the place of trial. He was put upon trial two weeks after the return of the indictment, the court having overruled his motion for witnesses, and for a continuance of the case, &c., so that he had no opportunity of making a defense, no matter how good a one he may have had.

Brief and Argument.

It is not entirely clear as to what Section of the Revised Statutes was made the basis or the indictment

herein. It is probable, however, that it was drawn under Section 5421, although certain language in the second count indicates that the pleader may have been following Section 5438. It is not material, however, so far as the objections to the second count of the indictment are concerned, under which section it was drawn. There are at least two separate and distinct offenses set forth in each of the sections referred to, viz.: Making and forging documents of various kinds, and presenting false claims to officers of the United States. See

United States vs. Staats, 8 Howard, p. 41.

United States vs. Corbin, II. Fed. Rep. 238.

United States vs. Wentworth, II. Fed. Rep. 52.

The first and third counts, set forth in the record, fail to show wherein the forgery and falsity of the documents mentioned, consist: whether false in statements contained therein, or in execution. The court held them both bad, so it is only necessary to consider the sufficiency of the second count upon which judgment was rendered.

The motion in arrest is a proper method of reaching the objections, we urge to this count. See

United States vs. Staats, 8 Howard, 41.

United States vs. Goggin, I. Fed. Rep., 49.

Our contention is that the indictment is not sufficiently certain in its allegations to apprise defendant of the exact charge of which he was convicted; whether he

was convicted and sentenced for forgery, or presenting false claims, they being under the Statute distinct offenses. Also many other fatal defects to which attention will be called.

This court will notice any errors appearing in the record, whether specially excepted or not. Therefore, if there are defects in the indictment other than those alleged in the motion in arrest, they may be considered. See—

J. W. Todd vs. United States, 159, U. S., 278.

Classen vs. United States, 142 U. S., 140.

The errors appearing in this second count are not in form only, but in substance: errors which would prejudice the rights of the plaintiff in error, if not corrected.

The indictment begins:

"Second count, forgery and making and presenting false charges against the Government."

That of itself is misleading, and leaves the defendant in doubt as to what charge is to be presented against him. Both of the charges cannot be presented in the same count.

The indictment first alleges that one Spahiga executed a certain declaration and affidavit, as set out in first count, one only of which was executed by Spahiga. That allegation would indicate that there were two separate and distinct papers referred to. See

United States vs. Corbin, Fed. R., 238.

This might not be a fatal defect, considered alone, but it is indicative of the uncertainty existing throughout the indictment. Following these allegations the pleader proceeds to charge that defendant presented said false declaration and affidavit in such a way as to make him guilty of a crime under the laws of the United States, and was alleged that this was done on the 4th day of August, 1892.

The indictment proceeds to charge defendant on said 4th day of August, 1892, with forging a certain pretended affidavit or certificate, "as hereinafter set out," but the document is not set out thereafter, but referred to it afterwards in a disconnected way as being set out in the first count of the indictment. There are, however, two documents mentioned in the first count, and the reference does not sufficiently iedntify either instrument, or pretend todo so. The concluding section of the indictment specifically charges defendant with "knowingly, wilfully, feloniously and falsely," forging the names to the instruments set out in the first count of the indictmdnt.

We submit that although the defendant is now serving sentence upon his conviction upon the second count, it is impossible to tell from the indictment and the verdict, for what crime he is being punished. The verdict is a general one, simply finding him guilty on the second

count, (page 6, printed record), without stating of what offense he is found guilty.

It is quite clear that defendant could not plead his present conviction and sentence as a bar, should he be again indicted either for the crime of forgery, or presenting false claims, growing out of the same prosecution.

It cannot be said that the indictment herein simply charges two offenses, and that the defendant should have before trial filed motion to require prosecution to elect upon which charge it would ask for a verdict. Neither the indictment or verdict, inform defendant of the charge of which he stands convicted.

In Evans vs. United States, 153 U. S., p. 584, Mr. Justice Brown uses the following language:

"Even in the case of misdemeanors, the indictment must be free from all ambiguity, and leave no doubt in the mind of the accused and the court, of the exact offense intended to be charged, not only that the former may know what he is called upon to meet, but that upon a plea of former acquittal or conviction, the record may show with accuracy the exact offense to which the plea relates."

In United States vs. Simmons, 96 U. S. Rep. 360, this court says, in speaking upon the question as to whether it is sufficient for the indictment to follow the language of the Statute:

"But to this general rule, there is the qualification

fundamental in criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty,—of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar, to any subsequent prosecution for the same offense."

Upon this subject see also:

Cochran vs. United States, 157, U. S. 286.

Pettibone vs. United States, 148, U S. 197.

United States vs. Hess, 124, U. S. 483.

United States vs. Coggin, 1 Fed. Rep. 49.

United States vs. Corbin, 11 Fed. Rep. 238.

The plaintiff in error was not given an opportunity to plead to the indictment before being put upon his trial, never having been arraigned, as is fully shown by an inspection of the printed record.

An arrangement is essential to a valid trial. See Section 1032 U. S. Revised Satutes.

Wharton on Criminal Law, Section 3154.

Bishops New Criminal Procedure, Vol. I, Sec. 733.

The foregoing is respectfully submitted.

A. H. GARLAND,

R. C. GARLAND,

Attorneys for Plaintiff in Error.

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Wharton on Criminal Law, Section 3154.

Bishops New Criminal Procedure, Vol. I. Sec. 735.

The foregoing is respectfully submitted.

A. H. GARLAND,

R. C. GARLAND,

Attorneys for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
FEB 27 1896
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

ALEX. W. CRAIN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 557.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

ALEX. W. CRAIN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 557.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR.

Alex. W. Crain, plaintiff in error, was indicted in three counts for the transmission of a forged pension claim to the Commissioner of Pensions on August 12, 1892. He was tried November 7, 1894, before Judge Parker and a jury, and found guilty upon all three. Judgment was subsequently arrested upon the first and third counts, and the defendant sentenced to three years' imprisonment upon his conviction on the second count. The only specific objection taken by the assignments of error is the denial of his motion in arrest of judgment upon that count.

The second count charges a criminal offense under § 5421 of the Revised Statutes, which is, so far as material, as follows:

> Every person who falsely makes, alters, forges, or counterfeits, or causes or procures to be falsely made, altered, forged, or counterfeited, or willingly aids or assists in the false making, altering, forging, or counterfiting, any * * * certificate * * * or other writing for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive, from the United States, or any of their officers or agents, any sum of money, * * * or who transmits to or presents at, or causes to be transmitted to or presented at, any office or officer of the Government of the United States, any * * * certificate * * * or other writing in support of or in relation to any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited, shall be imprisoned at hard labor for a period of not less than one year nor more than ten years, or shall be imprisoned not more than five years and fined not more than one thousand dollars.

The second count charges that on August 4, 1892—

> One Spahiga is alleged to have executed a certain declaration and affidavit; said declaration and affidavit are in words and figures as set out in the first count of this indictment, and said declaration and affidavit purporting to be executed before one A. W. Crain, U. S. Commissioner, * * * the said Spahiga claiming in said declaration a pension from the United States as soldier of war of rebellion; * * * said declaration and affidavit, after being so made, executed, and falsely counterfeited and forged by said Alex. W. Crain, was by said Alex. W.

Crain forwarded, with intent to defraud the United States and to obtain certain money from the United States, to the office of the Commissioner of Pensions, * * * where the same was duly filed on the 12 day of Aug., 1892, as a claim against the Government of the United States for a pension by the said Spahiga, as soldier aforesaid, as aforesaid, and being so filed for approval by the said A. W. Crain * * * and the said affidavit and declaration being material on the question pending before said Commissioner of Pensions as to whether the said Spahiga was by the laws of the United States entitled to a pension.

It is further alleged that on the same day—

One Alex. W. Crain did make, execute, and forge, and cause to be made, executed, and forged, a certain pretended and false affidavit, or the same may be called a certificate, the same being one and the same paper, and being in form and substance as hereinafter set out, which said forged, false, and counterfeited affidavit or certificate was fraudulent, and was a part of the said declaration and affidavit above mentioned, and was forwarded, together with the said declaration, to the office of the Commissioner of Pensions aforesaid for the purpose of defrauding the United States and of aiding and abetting the said Spahiga to obtain the approval of the said Commissioner of Pensions to his said claim for a pension as aforesaid, for the purpose of aiding the said Spahiga fraudulently to obtain money from the United States; which said pretended and false affidavit and certificate is in substance set out in the first count of this indictment.

That said pretended affidavit and certificate and declaration was forged, false, and fraudulent, and did contain fraudulent and fictitious statements, as

the said A. W. Crain well knew, in this: That Pahose Marrell, Spahiga, and Nokos Fixico did not sign said pretended affidavit and certificate, declaration and affidavit, as set forth in said false certificate and affidavit, and said Pahose Marrell, Spahiga, and said Nokos Fixico were not sworn [etc.], but in truth and fact the said A. W. Crane did knowingly and wilfully, feloniously and falsely, make, counterfeit, forge, and cause to be made, counterfeited, and forged, the names of Pahose Marrell, Spahiga, and Nokos Fixico to and upon the said salse and forged affidavit and certificate with intent to defraud the United States and to aid the said Spahiga in obtaining money fraudulently from the United States, and that the said A. W. Crain did not swear the said Pahose Marrell [etc.].

The first count of the indictment sets forth the pretended declaration of Spahiga, which is on one of the regular department forms, seeking a pension under the act of June 27, 1890. Annexed thereto is an affidavit of Pahose Marrell and Nokos Fixico, stating that they saw the claimant sign his name to the declaration and had every reason to believe that he was the identical person he represented himself to be, etc. Annexed to the declaration and affidavit is the jurat and certificate of A. W. Crain, signing as "U. S. Comm'r, Pension Notary."

The objections taken on the motion in arrest of judgment (p. 9) are duplicity; lack of certainty in the description of the "affidavit, certificate, or declaration;" incompleteness of the count, which "in an indefinite and uncertain manner refers to a document contained and set forth in the first count of the said indictment;" indefi-

niteness and misleading character, alleging that the three names "were forged to one and the same document, as set out in the first count of the indictment, which is not a fact;" failure to "state in what particular the affidavit, or declaration, or certificate, set out therein is false and was forged;" and failure in general to charge in a legal manner an offence against the laws of the United States.

SUFFICIENCY OF SECOND COUNT.

The count is inartificially drawn, but clearly charges that the defendant forged the signatures of these three Indians to the document or series of documents fully set forth in the first count; that he did so for the purpose of defrauding the United States and obtaining from it a sum of money for another person, to wit, Spahiga, and that he presented it for that purpose to an officer of the United States, namely, the Commissioner of Pensions.

There is no duplicity in the heading (which was, indeed, unnecessary). There are merely two names given to the same crime.

The inartificialities in this count are cured by § 1025 of the Revised Statutes, which has recently been so often applied by this court.

The objection of duplicity would have been cured by the verdict at common law, even if it would have been fatal upon demurrer. (1 Bish. New Crim. Proc., §§ 442, 443.)

The fact that judgment was arrested upon the first count does not destroy it for the purpose of reference from a succeeding count. (1 Bish. New Crim. Proc., § 431.)

OMISSION TO RECORD THE PLEA.

No error is assigned on account of the omission to record the plea of not guilty. This omission is one which this court under its rule may or may not notice, at its option.

It is plain that no substantial right of the prisoner was forfeited by the omission. Evidently the defendant pleaded not guilty, although the clerk omitted to record the plea. Not only does the record state that there was an "issue joined" (p. 6), while defendant's counsel fails to refer to the absence of a plea, either in the motion in arrest of judgment (pp. 8–10), or when the prisoner was called for sentence (p. 7); but the bill of exceptions (an unnecessary document, by the way) also states that the jury were impaneled "to try the issues joined in the above entitled cause" (p. 8).

It thus appearing that no substantial error was committed, and that there was a plea, whose failure to appear expressly of record is a mere clerical error, it is respectfully submitted that it does not merit the special favor of this court.

EDWARD B. WHITNEY,
Assistant Attorney General.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 206.

THE WESTERN UNION TELEGRAPH COMPANY,
PLAINTIFF IN ERROR,

vs.

DAVID W. JAMES.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

FILED JANUARY 6, 1893.

(15,240.)

(15,240.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 206.

THE WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

DAVID W. JAMES.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

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1 UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States of America to the Honorable the judges of the supreme court of the State of Georgia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Western Union Telegraph Company, plaintiff in error, and David W. James, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause
2 of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said The Western Union Telegraph Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the eighth day of December, in the year of our Lord one thousand eight hundred and ninety-two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—with direction that the writ shall operate as a supersedeas—

L. Q. C. LAMAR,
Associate Justice of the Supreme Court of the United States.

Filed in clerk's office, supreme court of Georgia, Dec. 16, 1892.
Z. D. HARRISON,
Clerk Supreme Ct. of Ga.

3 UNITED STATES OF AMERICA, *ss:*

To David W. James, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Georgia, wherein The Western Union Telegraph Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Lucius Q. C. Lamar, associate justice of the Supreme Court of the United States, this eighth day of December, in the year of our Lord one thousand eight hundred and ninety-two.

L. Q. C. LAMAR,
Associate Justice of the Supreme Court of the United States.

4 GEORGIA, }
Early County. }

On this the fourteenth day of December, in the year of our Lord one thousand eight hundred and ninety-two, personally appeared R. H. Powell before me, the subscriber, J. W. Alexander, clerk of the superior court of Early county, Georgia, and makes oath that he delivered a true copy of the within citation to David W. James, the party named in the within writ, on this day.

R. H. POWELL.

Sworn to and subscribed the 14th day of December, A. D. 189–.

J. W. ALEXANDER, *C. S. C.*

Filed in clerk's office, supreme court of Ga., Dec. 16, 1892.
Z. D. HARRISON,
Cl'k S. C. Ga.

5 To the Honorable L. Q. C. Lamar, one of the justices of the Supreme Court of the United States:

The petition of the Western Union Telegraph Company shows that October 6, 1891, there was tried in the superior court of Early county, of the State of Georgia, a case in which David W. James was plaintiff and your petitioner was defendant. The declaration in said case claimed for an alleged failure duly to deliver a certain telegraphic dispatch therein set out, in one count special damages and in another count a penalty of one hundred dollars under an act of the legislature of Georgia dated October 22, 1887. Said

company in said case, by plea and motion to dismiss the count claiming said penalty, alleged and contended that said dispatch which had been delivered to it in Alabama to be transmitted thence over its lines to the sendee in Georgia was commerce among the two States last mentioned, and said act of the legislature of Georgia is, as to such dispatch, in conflict with the clause of the Federal Constitution which is as follows: "The Congress shall have power * * * to regulate commerce with foreign nations and among the several States and with the Indian tribes." Said motion was denied, and, the court charging that said penalty was recoverable under said act, there was a verdict for the plaintiff for said special damages and also for said penalty; whereupon your petitioner made a motion for a new trial, complaining therein because the motion to dismiss said count was denied as aforesaid, and the court charged the jury as to said penalty as above narrated. Said superior court refused a new trial; whereupon your petitioner took a bill of exceptions to the supreme court of Georgia, assigning therein as error the refusal of the superior court aforesaid to grant a new trial. At the March term, 1892, of said supreme court of Georgia said case was argued, and August 27, 1892, it reversed the judgment of said superior court because it erred in not granting a new trial upon your petitioner's complaint as to the special damages aforesaid, but it directed that the plaintiff below have leave to write off said special damages, and, should he write off the same, the judgment thus modified was to stand affirmed for said penalty. At the next term of said superior court, November 14, 1892, said special damages were written off by said plaintiff, the former judgment for said penalty was thereby affirmed, and the aforesaid judgment of the supreme court of Georgia as to said penalty complained of herein became final.

Your petitioner shows that a Federal question was made in said case, to wit, said act of the legislature of Georgia was brought in question as being, as to interstate telegraphic dispatches to
6 be delivered in Georgia, repugnant to the Constitution of the United States, and the decision by said supreme court was in favor of the validity of said statute; and, further, that a decision of said Federal question was necessary to the judgment rendered.

Wherefore your petitioner presents herewith an exemplified transcript of the record of said supreme court of Georgia in said case, together with an exemplified transcript of said judgment of the superior court making the judgment of the supreme court its own judgment, and prays that a writ of error to said supreme court be allowed; that citation be granted and signed; that the bond herewith presented be approved, and that upon compliance with the terms of the statute in such case made and provided said bond and writ of error may operate as a supersedeas; that the errors complained of be reviewed in the Supreme Court of the United States and the judgment of said supreme court of Georgia be reversed.

JNO. F. DILLON,
GEO. H. FEARONS &
RUSH TAGGERT,
Of Counsel for Petitioner.

WASHINGTON, D. C., *December* 5, 1892.

The writ of error as herein prayed for is hereby allowed this December 5, 1892.

L. Q. C. LAMAR,
Associate Justice of the Supreme Court of the United States.

Filed in clerk's office, supreme court of Ga., Dec. 16, 1892.
Z. D. HARRISON,
Cl'k S. C. Ga.

7 Supreme Court of the United States.

THE WESTERN UNION TELEGRAPH COMPANY
v.
DAVID W. JAMES.

In error to the supreme court of Georgia.

Know all men by these presents that we, The Western Union Telegraph Company, a corporation created, organized, and existing under the laws of the State of New York, and Thomas T. Eckert and George J. Gould, are held and firmly bound unto David W. James in the sum of five hundred dollars, to be paid to the said David W. James, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs and administrators and successors, firmly by these presents.

Sealed with our seals and dated this 1st day of December, 1892.

Whereas the above-named The Western Union Telegraph Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the supreme court of the State of Georgia:

Now, therefore, the condition of this obligation is such that if the above-named The Western Union Telegraph Company shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THE WESTERN UNION TELEGRAPH COMPANY,
By NORVIN GREEN, *Pres't.* [L. S.]
THOS. T. ECKERT. [L. S.]
GEO. J. GOULD. [L. S.]

[SEAL.] A. R. BREWER, *Secretary.*

Sealed and delivered in presence of—
GEO. H. FEARONS.

The above bond is hereby approved this 5th day of December, 1892.

L. Q. C. LAMAR,
Associate Justice of the Supreme Court of the United States.

Filed in clerk's office, supreme court of Ga., Dec. 16, 1892.

Z. D. HARRISON,
Cl'k S. C. Ga.

8 Supreme Court of the United States, October Term, 1893.

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,
v.
DAVID W. JAMES, Defendant in Error.

And now, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes The Western Union Telegraph Company, the plaintiff in error in the above-stated cause, by its counsel, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

That the supreme court of the State of Georgia erred in adjudging and deciding that the act of the legislature of said State entitled "An act to prescribe the duty of electric telegraph companies as to receiving and transmitting despatches, to prescribe penalties for violations thereof, and for other purposes," approved October 22, 1889, as to an interstate telegraphic despatch which is not delivered by an electric telegraph company within a reasonable time after its reception by said company at the office in Georgia from which the delivery is to be made is not repugnant to that clause of the eighth section of article first of the Constitution of the United States which provides that the Congress shall have power to regulate commerce among the several States.

Plaintiff in error says that in the aforesaid suit there was drawn in question the validity of said statute of the State of Georgia on the ground of its being repugnant, as to such interstate telegraphic despatch described above, to said clause of the Federal Constitution, providing that the Congress shall have power to regulate commerce among the several States, and the decision of said supreme court of the State of Georgia was in favor of its validity; to which judgment and decision the plaintiff in error excepts and assigns the same as error.

Wherefore the said Western Union Telegraph Company prays that the judgment and decision aforesaid may be reversed, annulled, and altogether held for naught, and it may be restored to all things which it hath lost by occasion of said judgment and decision.

JNO. F. DILLON,
RUSH TAGGART &
GEO. H. FEARONS,
Solicitors and of Counsel for Plaintiff in Error.

Filed in clerk's office, supreme court of Ga., Dec. 16th, 1892.

Z. D. HARRISON,
Cl'k S. C. Ga.

9 GEORGIA, }
Early County. }

The plaintiff in error, The Western Union Telegraph Company, by their counsel, R. H. Powell, respectfully shows that on the 6th day of October, 1891, during the regular term of the superior court of said county, his honor Jas. H. Guerry, judge of said court, presiding, there came on to be tried a case in which David W. James was plaintiff and The Western Union Telegraph Company was defendant, the same being a complaint for the penalty imposed by the statute of the State for the failure to deliver a telegram in a reasonable time and for damages resulting to plaintiff from a delay on part of defendant in delivering to plaintiff in a reasonable time, in which case there was a verdict and judgment for plaintiff upon both counts in plaintiff's declaration during said term of said court. The plaintiff in error, the defendant in the court below, moved for a new trial in said court, which motion was heard and determined by the court during said term, the recitals of facts in said motion being true as therein set forth and so certified and allowed by the court in said motion, and a brief of the evidence having been approved by the trial judge and filed and thereby made a part of the record in such case, and upon the hearing of said motion for new trial the court overruled said motion and refused to set aside said verdict and judgment and to grant a new trial as prayed for in said motion; to all of which defendant excepted.

Whereupon the said Western Union Telegraph Company, plaintiffs in error, excepts to said decision, and on this the 10th day of October, 1891, tenders this bill of exceptions within 30 days from the adjournment of the court, and alleges error upon each of the grounds set forth in said motion for new trial, to wit:

1st. That the court erred in not granting a new trial upon the ground that the verdict is contrary to the evidence.

2d. That the court erred in not granting a new trial on the ground that the verdict is contrary to the law.

10 3d. That the court erred in not dismissing from plaintiff's declaration the count set out therein which sets forth plaintiff's right to recover from defendant the statutory penalty of one hundred dollars for not delivering the telegram therein set out from J. W. Tullis & Co. to plaintiff within a reasonable time, said telegram appearing to have been received by defendant's agent at Eufaula, Alabama, and transmitted to plaintiff at Blakely, Georgia, said telegram being an interstate message and not controlled by the Georgia statute.

4th. That the court erred in not nonsuiting plaintiff, upon motion of defendant's attorney, as to the count set out in said declaration for damages in not transmitting and delivering said telegram in a reasonable time, because the proof showed that more than sixty days had expired between the date of delivery of said telegram and the date of plaintiff's demand upon defendant for damages, the telegram having been received by defendant's agent at 35 minutes after 9 o'clock on the night of the 4th day of November, 1890, and

delivered at about 10 o'clock on the morn- of the 5th of November, 1890, and the proof showing that the demand for damages was made by plaintiff on defendant's agent on the 18th day of February, 1891, the telegram being written on a blank containing the following words: "The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message," also containing these words: "☞ Read the notice and agreement at the top," and as delivered to plaintiff was written on a blank containing the words "Nor in any case where the claim is not presented in writing within sixty days after the sending of the message" (referring to the payment of damages); signed by the president and manager of defendant's company.

5th. That the court erred, under the facts in this case, in charging the jury as follows: "I charge you that if the defendant, the telegraph company, undertook to transmit to this place a message which had been paid for at the other end of the line and did fail to deliver the message to James within a reasonable time from
11 the time it was received, the plaintiff is entitled to recover, for the failure to deliver, $100.00 as a penalty fixed upon that act by law."

6th. That the court erred, under the facts in this case, in charging the jury as follows: "I charge you that if you should believe that the defendant's company did receive a message at their office for Mr. James, and then, from a failure to deliver it within a reasonable time, a loss actually occurred to him, he would be entitled to recover whatever amount you should find that loss to be."

7th. That the court erred in charging the jury as follows: "If you should find that he (referring to plaintiff) failed to make the sale by reason of the failure to deliver the message, and that he diligently attempted to sell the cotton afterwards and could not sell it on account of the character and condition of the market, but continued to make an effort to sell and finally did sell, the measure of damages would be the difference between the price he would have received for the cotton if he had made the sale and the price he actually got when he did sell."

8th. Because the court erred in charging the jury as follows: "If you should find that the message was not delivered within a reasonable time under the attending circumstances, your verdict would be for the plaintiff upon both of the propositions."

Plaintiff in error shows that that portion of the record in this case that is necessary to a clear understanding of the errors complained of is plaintiff's declaration, defendant's plea, both original and amended, the motion for new trial, and the brief of evidence approved and filed under order of the court in said case, with said motion for new trial, and said plaintiff in error, by their counsel, pray that this their bill of exceptions may be signed and certified as required by law in such cases.

R. H. POWELL,
Att'y for Plaintiff in Error.

12 I do certify that the foregoing bill of exceptions is true and contains or specifies all of the evidence and specifies all of the record material to a clear understanding of the errors complained of, and the clerk of the superior court of Early county is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified and certify the same as such and cause the same to be transmitted to the March term of the Supreme Court, that the errors alleged to have been committed may be considered and corrected.

October 10th, 1891.

J. H. GUERRY,
J. S. C., P. C.

GEORGIA,
Early County.

I do certify that the foregoing is the true original bill of exceptions which was filed in my office in the case of D. W. James *vs.* The Western Union Telegraph Company.

Given under my hand & seal of office this Nov. 10th, 1891.

[SEAL.] J. W. ALEXANDER, *Cl'k S. C.*

Service and copy wa-ved as to within bill of exceptions.
Due and legal service acknowledged Oct. 14th, 1891.

WM. D. KIDDOO,
Att'y for Def't in Error.

Filed in office Oct. 17th, 1891.

J. W. ALEXANDER, *C. S. C.*

Filed in office Nov. 14, 1891.

LOGAN BLECKLEY,
D. C., S. C., Ga.

R. H. POWELL,
Att'y for Pl'ff in Error.

13 CLERK'S OFFICE, SUPREME COURT OF GEORGIA,
ATLANTA, GA., *Nov.* 26, 1892.

I hereby certify that the foregoing pages hereto attached contain a true copy of the original bill of exceptions in the case therein stated as appears from said original now of file in this office.

Witness my signature and the seal of said court, hereto affixed, the day and year above written.

[Seal Supreme Court of the State of Georgia, 1845.]

Z. D. HARRISON, *Clerk.*

14 DAVID W. JAMES } Early Sup'r Court,
vs. } April Term, 1891.
THE WESTERN UNION TELEGRAPH COMPANY. } Complaint.

Original. Filed in office Feb'y 23rd, 1891. J. W. Alexander, C. S. C.

GEORGIA, }
Early County. }

To the superior court of said county:

The petition of David W. James shows that the Western Union Telegraph Company is a foreign corporation, owning a line of telegraph wires, partly in said State, and engaged in telegraphing for the public, for profit, and doing business in said county, and now has and at the time of all the facts hereinafter stated had and keeps an office and agent for the transaction of business in the town of Blakely, in said county; that your petitioner is a merchant and warehouseman, and was and is engaged in the business of buying and selling cotton for profit, and on the fourth day of November, eighteen hundred and ninety, first having paid the company's charges therefor, delivered for transmission to the said The Western Union Telegraph Company a message in the following words, to wit:

"BLAKELY, GA., 11, 4, 1890.

To J. W. Tullis & Co., Eufaula, Ala.:

Have fifty bales strict good ordinary, offer them, seven & three-quarters, twenty-five, good ordinary. Seven & quarter. All have been classed by your man, reweighed, but not branded, would like to put them in—answer to-night."

"D. W. JAMES."

The said Jno. W. Tullis & Co. were and are cotton merchants, doing business in Eufaula, Alabama (at which place the said corporation had an office and agent), and at the said date the said Jno. W. Tullis & Co. had purchased a lot of cotton from petitioner and had at Blakely, Ga., an agent named Winthrop, for the purpose of classifying, grading, receiving, and shipping cotton; and who was on said date engaged in receiving and shipping the said lot
15 of cotton of higher grade than those described in the foregoing dispatch and who had classed the cotton described in the same as stated in said message; and on the said fourth day of November, eighteen hundred and ninety, the said Jno. W. Tullis & Co., having paid the corporation's charges therefor, sent by the same corporation a reply to the aforecopied dispatch, a message in the following words, to wit:

"EUFAULA, ALA., 11, 4, 1890.

To D. W. James, Blakely, Pithiness:

We do not want the low grades, but as a favor to you will take them as offered, provided Mr. Winthrop says they are full grade & is there to ship them. Show this to *to* Winthrop & ship chudding to Fall River and Chubby to Baltimore. Answer.

JNO. W. TULLIS & CO."

12 I do certify that the foregoing bill of exceptions is true and contains or specifies all of the evidence and specifies all of the record material to a clear understanding of the errors complained of, and the clerk of the superior court of Early county is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified and certify the same as such and cause the same to be transmitted to the March term of the Supreme Court, that the errors alleged to have been committed may be considered and corrected.

October 10th, 1891.

J. H. GUERRY,
J. S. C., P. C.

GEORGIA,
Early County.

I do certify that the foregoing is the true original bill of exceptions which was filed in my office in the case of D. W. James *vs.* The Western Union Telegraph Company.

Given under my hand & seal of office this Nov. 10th, 1891.

[SEAL.] J. W. ALEXANDER, *Cl'k S. C.*

Service and copy wa-ved as to within bill of exceptions.
Due and legal service acknowledged Oct. 14th, 1891.

WM. D. KIDDOO,
Att'y for Def't in Error.

Filed in office Oct. 17th, 1891.

J. W. ALEXANDER, *C. S. C.*

Filed in office Nov. 14, 1891.

LOGAN BLECKLEY,
D. C., S. C., Ga.

R. H. POWELL,
Att'y for Pl'ff in Error.

13 CLERK'S OFFICE, SUPREME COURT OF GEORGIA,
ATLANTA, GA., *Nov.* 26, 1892.

I hereby certify that the foregoing pages hereto attached contain a true copy of the original bill of exceptions in the case therein stated as appears from said original now of file in this office.

Witness my signature and the seal of said court, hereto affixed, the day and year above written.

[Seal Supreme Court of the State of Georgia, 1845.]

Z. D. HARRISON, *Clerk.*

14 DAVID W. JAMES } Early Sup'r Court,
vs. } April Term, 1891.
THE WESTERN UNION TELEGRAPH COMPANY. } Complaint.

Original. Filed in office Feb'y 23rd, 1891. J. W. Alexander, C. S. C.

GEORGIA, }
Early County. }

To the superior court of said county:

The petition of David W. James shows that the Western Union Telegraph Company is a foreign corporation, owning a line of telegraph wires, partly in said State, and engaged in telegraphing for the public, for profit, and doing business in said county, and now has and at the time of all the facts hereinafter stated had and keeps an office and agent for the transaction of business in the town of Blakely, in said county; that your petitioner is a merchant and warehouseman, and was and is engaged in the business of buying and selling cotton for profit, and on the fourth day of November, eighteen hundred and ninety, first having paid the company's charges therefor, delivered for transmission to the said The Western Union Telegraph Company a message in the following words, to wit:

"BLAKELY, GA., 11, 4, 1890.

To J. W. Tullis & Co., Eufaula, Ala.:

Have fifty bales strict good ordinary, offer them, seven & three-quarters, twenty-five, good ordinary. Seven & quarter. All have been classed by your man, reweighed, but not branded, would like to put them in—answer to-night."

"D. W. JAMES."

The said Jno. W. Tullis & Co. were and are cotton merchants, doing business in Eufaula, Alabama (at which place the said corporation had an office and agent), and at the said date the said Jno. W. Tullis & Co. had purchased a lot of cotton from petitioner and had at Blakely, Ga., an agent named Winthrop, for the purpose of classifying, grading, receiving, and shipping cotton, and who was
on said date engaged in receiving and shipping the said lot
15 of cotton of higher grade than those described in the foregoing dispatch and who had classed the cotton described in the same as stated in said message; and on the said fourth day of November, eighteen hundred and ninety, the said Jno. W. Tullis & Co., having paid the corporation's charges therefor, sent by the same corporation a reply to the aforecopied dispatch, a message in the following words, to wit:

"EUFAULA, ALA., 11, 4, 1890.

To D. W. James, Blakely, Pithiness:

We do not want the low grades, but as a favor to you will take them as offered, provided Mr. Winthrop says they are full grade & is there to ship them. Show this to *to* Winthrop & ship chudding to Fall River and Chubby to Baltimore. Answer.

JNO. W. TULLIS & CO."

which message was received at Blakely the same day, at which time and until eight o'clock of the next morning the said Mr. Winthrop was in Blakely, Ga., ready to and expected to receive and ship the cotton described in the aforesaid telegrams. Your petitioner's place of business and residence are both in the said town of Blakely and within less than one mile of the said telegraph office, and at the time of the delivery of the first message aforecopied to the agent of the said corporation he was informed of the great importance of a reply thereto that night, and petitioner offered to send a message to the office for the same, but the agent promised faithfully to deliver the same to your petitioner that night, if he received the same, and the said corporation understood to deliver the said dispatch from the said Jno. W. Tullis & Co. to your petitioner in a reasonable time after receiving the same at Blakely and did not deliver the same to your petitioner in a reasonable time after receiving it at Blakely nor until ten (10) o'clock of the next day after, and when delivered by gross negligence the words "and ship chucking to Baltimore and" were left out of dispatch — its said reception, before which said last-named time the said Mr. Winthrop had left the town and your petitioner made every reasonable effort to stop him and secure his return and to induce the said Jno. W. Tullis & Co. to take the cotton at the price they had offered to take the same, provided Mr. Win-
16 throp was in Blakely. Your petitioner further states that the cotton referred to in the said telegram was his property, was full grade, and the said Mr. Winthrop was ready to say the said cotton met all the requirements of the said telegrams; and your petitioner alleges that he was unable after that time to sell the said cotton for the prices the said Jno. W. Tullis & Co. agreed to pay, but, on the contrary, was compelled to sell the same for the sum of two hundred and forty-two dollars and sixty cents less; and the said Western Union Telegraph Company by the gross carelessness and negligence of its agents and servants has damaged your petitioner the said sum of two hundred and forty-two dollars and sixty cents and hath incurred the penalty of one hundred dollars fixed by the statutes for failure to transmit and deliver the said dispatch from Jno. W. Tullis & Co. with impartiality and good faith and with due diligence and has thus become liable to your petitioner in the sum of three hundred and forty-two dollars and sixty cents & interest thereon, the amount of said damages and penalty, which said sum the said Western Union Telegraph Company refuses to pay.

Wherefore your petitioner prays process may issue requiring the said The Western Union Telegraph Company to be and appear at the next superior court for said county to answer your petitioner's complaint.

WM. D. KIDDOO,
Pl'ff's Att'y.

GEORGIA,
Early County.

D. W. JAMES
vs.
THE WESTERN UNION TELEGRAPH COMPANY.

To the sheriff of said county or his lawful deputy, Greeting:

The defendant is hereby required personally or by attorney to be and appear at the next term of the superior court, to be held in & for said county on the first Monday in April next, then & there to answer the plaintiff's complaint, as in default thereof the court will proceed as to justice shall appertain.

Witness the Hon. J. H. Guerry, judge of said court, this February 23rd, 1891.

J. W. ALEXANDER, *C. S. C.*

17 GEORGIA,
Early County.

Served the defendant by delivering a copy of the within declaration & process personally to the agent of the defendant in Blakely, said county.

Feb'y 23rd, 1891.

I. E. BLACK, *Sh'r'ff.*

D. W. JAMES
vs.
THE WESTERN UNION TELEGRAPH COMPANY.

We, the jury, find for plaintiff one hundred dollars penalty; also two hundred and forty-two & $\frac{60}{100}$ dollars for damages.

Oct. 6th, 1891.

S. H. POWELL, *Foreman.*

Early Superior Court, Oct. Term.

OCTOBER 6TH, 1891.

Whereupon it is considered, ordered, and adjudged that the plaintiff do recover of the defendant the sum of one hundred dollars as penalty and the sum of two hundred and forty-two dollars and sixty cents for damages, total sum of three hundred and forty-two dollars and sixty cents penalty and damages, and —— dollars —— cents for costs.

J. H. GUERRY,
J. S. C., P. C.

WM. D. KIDDOO, *Pl'ff's Att'y.*

Early Superior Court, April Term, 1891.

D. W. JAMES
vs.
THE WESTERN UNION TELEGRAPH COMPANY. } Plea Filed.

Filed in office April 4th, 1891.

J. W. ALEXANDER, *C. S. C.*

18 And now comes the defendant in the above-stated case and for plea and answer thereto says that it is not liable to plaintiff in manner and form alleged, and of this it puts itself upon the country; and for further plea and answer in this behalf defendant says that it is not liable for the losses sued for in plaintiff's complaint, if the facts stated therein be true, because said dispatch was delivered within a reasonable time after the same — received; but this defendant alleges that said message was delivered at or about 8 a. m., Nov. 5th, 1890, after it had been received, at 9.45 p. m., at Eufaula, Alabama, on the day previous. Defendant alleges that its office in Blakely is not required to be kept open by the rules of def't's company between the hours of 8 p. m. and 8 a. m. of the next day, which rules are reasonable and were known to plaintiff at the time of sending and receiving the dispatches referred to in plaintiff's declaration. Defendant further shows that the telegram from Jno. W. Tullis & Co. set out in plaintiff's declaration was not delivered at defendant's office in Eufaula, Alabama, until after the hour for closing the office at Blakely, to which office it was sent, and could not have been delivered from the Blakely office to plaintiff until after Mr. Winthrop's departure from the town of Blakely on the morning of the 5th of November. Defendant further shows that under the contract of sending both of said messages set out in plaintiff's declaration (a copy of which is hereto attached and marked Exhibits "A" & "B") said plaintiffs should not recover in this suit for the following reasons: That said company is not responsible beyond the amount received for toll for sending said message, — was not repeated, and if said message was repeated they would not be liable for more than 50 times the amount received for sending same. Defendant further shows that under their contract for sending said messages they are not liable to plaintiff for damages as alleged, because their claim was not presented in writing within 60 days after sending the message; and for further plea and answer in this behalf defendant says that they transmitted plaintiff's dispatches in the order in which they were received; & and for this they put themselves upon the country.

R. H. POWELL,
Def't's Att'y.

18*a* Form No. 2.

The Western Union Telegraph Company.

All messages taken by this company are subject to the following terms:

To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeated message, whether happening by negligence of its servants or otherwise beyond the amount received

for sending the same; nor for mistakes, or delays in the transmission or delivery, or for non-delivery, of any repeated message beyond fifty times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination.

Correctness in the transmission of message to any point on the lines of this company can be insured by contract in writing, stating agreed amount of risk, and payment of premium thereon at the following rates, in addition to the usual charge for repeated messages, viz: one per cent. for any distance not exceeding 1,000 miles, and two per cent. for any greater distance. No employee of the company is authorized to vary the foregoing.

No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices; and if a message is sent to such office by one of the company's messengers, he acts for that purpose as the agent of the sender.

Messages will be delivered free within the established free-delivery limits of the terminal office. For delivery at a greater distance, a special charge will be made to cover the cost of such delivery.

The company will not be liable for damages in any case where the claim is not presented in writing, within sixty days after sending the message.

NORVIN GREEN, *President.*

THOS. T. ECKERT,
General Manager.

Receiver's No.,	Time filed,	Check,
——.	9.45 p. m.	47, paid.

Send the following message, subject to the above terms, which are hereby agreed to:

Nov. 4TH, 1899.

To D. W. James, Blakely, Ga.:

Pithiness. We do not want the low grades, but as a favor to you will take them as offered, provided, Mr. Winthrop says they are full grades and is there to ship them. Show this to Winthrop, and ship Chuckling to Fall River & Chubby to Baltimore. Answer.

JNO. W. TULLIS & CO.

☞Read the notice and agreement at the top.☜

(Copy.)

18*b* Form No. 2.

The Western Union Telegraph Company.

All messages taken by this company are subject to the following terms:

To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeated message, whether happening by negligence of its servants or otherwise beyond the amount received for sending the same; nor for mistakes, or delays in the transmission or delivery, or for non-delivery, of any repeated message beyond fifty times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination.

Correctness in the transmission of message to any point on the lines of this company can be insured by contract in writing, stating agreed amount of risk, and payment of premium thereon at the following rates, in addition to the usual charge for repeated messages, viz: one per cent. for any distance not exceeding 1,000 miles, and two per cent. for any greater distance. No employee of the company is authorized to vary the foregoing.

No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices; and if a message is sent to such office by one of the company's messengers, he acts for that purpose as the agent of the sender.

Messages will be delivered free within the established free-delivery limits of the terminal office. For delivery at a greater distance, a special charge will be made to cover the cost of such delivery.

The company will not be liable for damages in any case where the claim is not presented in writing, within sixty days after sending the message.

NORVIN GREEN, *President.*

THOS. T. ECKERT,
General Manager.

Receiver's No., 11.	Time filed, ——.	Check, 40, paid.

Send the following message, subject to the above terms, which are hereby agreed to:

Nov. 4th, 1890.

To J. W. Tullis & Co., Eufaula, Ala.:

Have fifty bales stricked good ordinary, offer them seven & three-quarters, twenty-five good ordinary, seven & quarter. All have been classed by your man reweighed, but not branded. Would like to put them in. Answer tonight.

D. W. JAMES.

6.

☞Read the notice and agreement at the top.☜

(Copy.)

19 *Complaint for Damages in Early Superior Court, "Amended Plea."*

Filed in office this Oct. 5th, 1891. J. W. Alexander, C. S. C.

EARLY COUNTY, *Georgia.*

DAVID W. JAMES
vs.
WESTERN UNION TEL. CO.

And now comes the defendants in the above-stated case and, with leave of the court, amend their plea, and, for further plea and answer, say that plaintiff should not recover the statutory penalty of $100 sued for, because the message in question was an interstate message and a part of the interstate commerce. Defendants, for further plea and answer, say that plaintiff should not recover, because no notice was given to defendant of the special circumstances whereby damages are alleged to have accrued to plaintiff nor was notice given to said defendants that they would be held liable for any decline in the price of cotton. Defendants, for further plea and answer, say that plaintiff should not recover, because the alleged damages would have accrued anyhow, if the telegram was delivered in a reasonable time, even though the time at which the message was delivered was not a reasonable time. Defendants, for further plea and answer, say that they are not liable to plaintiff for damages, as the damages alleged in his petition are too contingent and remote.

R. H. POWELL,
Def'ts' Att'y.

20 *Motion for New Trial.*

Filed Oct. 8th, 1891. J. W. Alexander, C. S. C.

D. W. JAMES
vs.
WESTERN UNION TELEGRAPH COMPANY.

Complaint for Damages & Forfeiture in Early Superior Court, October Term, 1891. Verdict & Judgment for Pl'ff.

And now comes the defendant in the above-stated case and before the adjournment of said court *and* moves the court to set aside

the verdict and judgment in said case, and that a new trial be granted therein upon the following grounds, to wit:

1st. Because the verdict of the jury is contrary to the evidence.

2nd. Because the verdict of the jury is contrary to law.

3rd. Because the court erred in not, upon the motion of defendant's counsel, dismissing from pl'ff's declaration the count set out therein which sets forth pl'ff's right to recover from defendant the statutory penalty of one hundred dollars for not delivering the telegram therein set out from J. W. Tullis & Co. to pl'ff within a reasonable time, said telegram appearing to have been received by def't's agent at Eufaula, Alabama, & transmitted to pl'ff at Blakely, Georgia (said telegram being an interstate message and not controlled by the Georgia statute).

4th. Because the court erred in not nonsuiting pl'ff upon motion of defendant's attorney as to the count set out in said declaration for damages in not transmitting & delivering said telegram in a reasonable time, because the proof showed that more than sixty days had expired between the date of the delivery of said telegram and *and* the date of plaintiff's demand upon defendant for damages, the telegram having been received by defendant's agent at thirty-
five minutes after 9 o'clock on the night of the 4th day of
21 November, 1890, and delivered at 10 o'clock on the morning of the 5th day of November, 1890, and the proof showed that the demand for damages was made by plaintiff on defendant's agent on 18th day of February, 1891. The telegram was written on a blank containing these words, "The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message," and containing these words, "☞ Read the notice and agreement at the top," and as delivered to pl'ff was written on a blank containing the words, "Nor in any case where the claim is not presented in writing within sixty days after the sending of the message." Signed only by president & manager of defendant.

5th. Because the court erred, under the facts in this case, in charging the jury as follows: "I charge you that if the defendant, the telegraph company, undertook to transmit to this place — which had been paid for at the other end of the line, and did fail to deliver the message to James within a reasonable time from the time it was received, the plaintiff is entitled to recover, for the failure to deliver, $100.00 as a penalty fixed upon that act by law."

6th. Because the court erred, under the facts in this case, in charging the jury as follows: "I charge you that if you should believe that *that* the defendant's company did receive a message at this office for Mr. James and then from their failure to deliver it within a reasonable length of time a loss actually occurred to him, he would be entitled to recover whatever amount you should find that loss to be."

7th. Because the court erred in charging the jury as follows: "If you should find that he (referring to pl'ff) failed to make the sale by reason of the failure to deliver the message, and that he diligently attempted to sell the cotton afterwards & could not sell it on

account of the character & condition of the market, but continued to make an effort to sell and finally did sell, the measure of damages would be the difference between the price he would have
22 received for the cotton if he had made the sale and the price he actually got when he did sell."

8th. Because the court erred in charging the jury as follows: "If you should find that the message was not delivered within a reasonable time under the attending circumstances your verdict would be for the plaintiff upon both of the propositions.

R. H. POWELL,
Def't's Att'y.

Service acknowledged. Copy waived of this motion for new trial. Oct. 8th, 1891.

WM. D. KIDDOO,
Pl'ff's Att'y.

October Term, 1891.

The recital of facts & grounds set out in the within motion for new trial being true & correct as therein set forth & hereby allowed, it is ordered by the court that the pl'ff show cause as soon as counsel can be heard why the verdict and judgment in said case should not be set aside and a new trial granted upon the grounds set forth in said motion, this October 8th, 1891.

J. H. GUERRY,
J. S. C., P. C.

October Term, 1891.

Upon hearing the motion for new trial in this case it is ordered by the court that said motion for new trial be overruled, and that said new trial is refused.

October 9th, 1891.

J. H. GUERRY,
J. S. C., P. C.

23 *Brief of Oral Testimony and Brief of Interrogatories Used on Trial.*

D. W. JAMES
vs.
WESTERN UNION TELEGRAPH COMPANY.

The oral testimony and the interrogatories read on the trial shows that David W. James, plaintiff, who was a buyer and seller of cotton, had sold to J. W. Tullis & Co., of Eufaula, Ala., a lot of cotton of higher grades, and Winthrop, a shipper of said Tullis & Co., was in Blakely grading and shipping it; that on the night of November 4th, 1890, said James sent a telegram to said Tullis & Co. in reference to the sale of some cotton of low grades, it being the dispatch referred to in plaintiff's declaration and referred to in the documentary evidence; that an answer to that telegram was re-

ceived at the Blakely office from the Eufaula, Ala., office at 10 o'clock p. m. of November 4th, 1890, which telegram was not delivered to plaintiff until about 10 o'clock a. m. of the next day and was then delivered to plaintiff's clerk, Chas. J. Faulk, with the statement that the agent forgot to deliver it at the office of defendant and was soon afterwards delivered to plaintiff; that Winthrop, the cotton buyer of J. W. Tullis & Co., left Blakely, Ga., for Eufaula, Ala., on the train at 8.15 a. m. Nov. 5th, 1890; that the train passed Leary, Georgia, at 8 minutes after 10 o'clock, and that plaintiff telegraphed him at that point, which telegram was received by him at that point; that Winthrop could have immediately returned from that point on a freight train, but did not do so. The office hours at the Blakely office *is* from 8 o'clock a. m. to 8 o'clock p. m. There was no notice of office hours sticking up in defendant's office & James only knew office hours, if at all, by the custom of office, witness being unable to state that he knew of it in any other way, but on the night of November 4th, 1890, the office was kept open until after 10 o'clock p. m. receiving and sending dispatches of election news.

24 Blakely, Ga., has a population of about 600 inhabitants.

Plaintiff requested the operator to deliver to him the reply of J. W. Tullis & Co. to his telegram as soon as it was received, as it was important, otherwise plaintiff himself would send for it, and operator promised to do so. There was no consideration for this extra promise unless it was the price paid for the telegram. Plaintiff's place of business is about 600 yards from telegraph office and his residence about ¼ of a mile off. Plaintiff sold 10 bales of this good ordinary cotton December 10th, 1890; 15 bales of same December 24th, 1890, and the 50 bales of strict good ordinary December 27, 1890, at loss of $244.70. Plaintiff made diligent efforts to sell this cotton all along until he did so; that plaintiff's recollection was that the price of cotton on high grades and on low grades got wider and wider apart after the 4th of November, 1890; that after that time plaintiff was unable to sell his low grades with his better grades of cotton. He had to ship them to Savannah. Plaintiff in this connection swore: "It was just an accident that I sold to Tullis & Co. this lot of low-grade cotton; don't know that it got harder to sell these low grades of cotton & that it went down after November 4th, 1890. They had gotten low and hard to sell before that time." Winthrop, the cotton buyer of Tullis & Co., left Blakely for Eufaula 8.15 a. m. Nov. 5th, 1890.

"*Brief of Documentary Evidence.*"

All of the telegrams sent by plaintiff and by J. W. Tullis & Co. had on them, and in addition to the written message, printed the following words, which appear upon the first message sent by James to Tullis & Co., a true copy of which here follows:

Form No. 2.

The Western Union Telegraph Company.

All messages taken by this company are subject to the following terms:

To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes, or delays in the transmission or delivery, or for non-delivery, of any repeated message beyond fifty times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company, is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination.

Correctness in the transmission of message to any point on the lines of this company can be insured by contract in writing, stating agreed amount of risk, and payment of premium thereon at the following rates, in addition to the usual charge for repeated messages, viz: one per cent. for any distance not exceeding 1,000 miles, and two per cent. for any greater distance. No employee of the company is authorized to vary the foregoing.

No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices; and if a message is sent to such office by one of the company's messengers, he acts for that purpose as the agent of the sender.

Messages will be delivered free within the established free-delivery limits of the terminal office. For delivery at a greater distance, a special charge will be made to cover the cost of such delivery.

The company will not be liable for damages in any case where the claim is not presented in writing, within sixty days after sending the message.

NORVIN GREEN, *President.*

THOS. T. ECKERT,
General Manager.

Receiver's No., 11.	Time filed, 85c., paid.	Check, 40, paid.

Send the following message, subject to the above terms, which are hereby agreed to:

Nov. 4th, 1890.

To J. W. Tullis & Co., Eufaula, Ala.:

Have fifty bales stric*ked* good ordinary. Offer them seven & three-quarters. Twenty-five good ordinary seven & quarter. All have been classed by your man, weighed, but not branded. Would like to put them in. Answer tonight.

D. W. JAMES.

O. K. N.

☞ Read the notice and agreement at the top. ☜

25 The messages received by plaintiff from J. W. Tullis & Co. in addition to the written message had on them the following printed words:

Form No. 2.

The Western Union Telegraph Company.

All messages taken by this company are subject to the following terms:

To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes, or delays in the transmission or delivery, or for non-delivery, of any repeated message beyond fifty times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company, is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination.

Correctness in the transmission of message to any point on the lines of this company can be insured by contract in writing, stating agreed amount of risk, and payment of premium thereon at the following rates, in addition to the usual charge for repeated messages, viz: One per cent. for any distance not exceeding 1,000 miles, and two per cent. for any greater distance. No employee of the company is authorized to vary the foregoing.

No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices; and if a message is sent to such office by one of the company's messengers, he acts for that purpose as the agent of the sender.

Messages will be delivered free within the established free-delivery limits of the terminal office. For delivery at a greater distance, a special charge will be made to cover the cost of such delivery.

The company will not be liable for damages in any case where the claim is not presented in writing, within sixty days after sending the message.

NORVIN GREEN, *President.*

THOS. T. ECKERT,
General Manager.

Receiver's No.,	Sent by—	Rec'd by—	Time filed,	Check,
3.	N. G.	F.	——.	15, paid.

Send the following message, subject to the above terms, which are hereby agreed to:

11, 5, 1890.

Received at Blakely, Ga., 12 m.
Dated at Eufaula, Ala., 5.

To D. W. James, Blakely, Ga.:

Yours—do not ship the low grades as cannot use them if Winthrop has left.

J. W. TULLIS & CO.

☞ Read the notice and agreement at the top. ☜

The message dated November 4th, 1890—time, 9.25 p. m.—from J. W. Tullis & Co. to plaintiff, set out in plaintiff's declaration and in defendant's plea. The message dated Nov. 5th, 1890, 10 a. m., from plaintiff to J. W. Tullis & Co., notified them of having just received their telegram; that Winthrop had left; that he had wired him to come back, and promised to ship as they would instruct. The message dated 11, 5, '90, from J. W. Tullis & Co. to plaintiff, instructs him not to ship cotton. The message dated Nov. 5th, 1890, from plaintiff to Winthrop, informed him that Tullis would take the cotton and asked him to return on freight train. The written notice served by plaintiff on defendant's agent, claiming the damages and penalty sued for in petition for not delivering telegram of J. W. Tullis & Co. to plaintiff of Nov. 4th, 1890, in a reasonable time, was dated and served Feb'y 18th, 1891.

26 It is agreed that this is a correct brief of the oral & documentary evidence in said case.

Oct. 8th, 1891.

R. H. POWELL,
Def't's Att'y.
WM. D. KIDDOO,
Pl'ff's Att'y.

The within brief of evidence is hereby approved as correct and allowed by the court. Order ordered filed as a part of the record in this case.

October 8th, 1891.

J. H. GUERRY,
J. S. C., P. C.

GEORGIA,
Early County.

I do certify that the foregoing (20) pages in number are a true and complete transcript of the record in the case of D. W. James *vs.* The Western Union Telegraph Company.

Given under my hand & seal of office this Nov. 10, 1891.

[SEAL.] J. W. ALEXANDER, *Cl'k S. C.*

Filed in office Nov. 14, 1891.

LOGAN BLECKLEY,
D. C., S. C., Ga.

27 CLERK'S OFFICE, SUPREME COURT OF GEORGIA,
ATLANTA, GA., *Nov.* 26, 1892.

I hereby certify that the foregoing pages hereto attached contain a true copy of the transcript of record in the case therein stated, as appears from said transcript now of file in this office.

Witness my signature and the seal of said court, hereto affixed, the day and year above written.

[Seal Supreme Court of the State of Georgia, 1845.]

Z. D. HARRISON, *Clerk.*

28 Supreme Court of the State of Georgia.

ATLANTA, GA., *August* 27, 1892.

The honorable supreme court met pursuant to adjournment.

Present: All of the justices.

The following judgment was rendered:

WESTERN UNION TELEGRAPH CO.
versus
DAVID W. JAMES.

This case came before the court upon a transcript of the record from the superior court of Early county, and, after argument had, it is considered and adjudged by the court that the judgment of the court below be reversed because the court erred in not granting a new trial, but with direction that the plaintiff below have leave to write off his recovery for special damages, in which event the judgment, thus modified, will stand affirmed for the penalty and costs, not including the costs of this writ of error either in the court below or in this court, these costs being chargeable to him.

Bill of costs: Entering case, $6.00; recording opinion, 75c.; remitter, $2.00; sheriff's fees, $1.25—$10.00.

Supreme Court of the State of Georgia.

CLERK'S OFFICE, ATLANTA, *Nov.* 26, 1892.

I certify that the above is a true extract from the minutes of the supreme court of Georgia, and that Messrs. Bigby, Reed & Berry paid the above bill of costs.

Seal Supreme Court of the State of Georgia, 1845.

Witness my signature and the seal of said court affixed the day and year last above written.

Z. D. HARRISON, *Clerk.*

29 WESTERN UNION TELEGRAPH COMPANY *v.* JAMES.

By the COURT:

1. It is competent for the General Assembly to require a telegraph company, under penalty, to deliver a message within a reasonable time after its reception by the company at the office in this State from which the delivery is to be made, whether the message be sent from another office of the company in this State or from one of its offices in another State. This has been done by the act of October 22d, 1887 (Acts of 1887, p. 111), and such act is not in this respect violative of the interstate commerce clause of the Federal Constitution. The recovery of the statutory penalty in this case was warranted by law and the evidence.

2. Whilst the contractual limitation to sixty days for presenting a claim for damages against a telegraph company does not apply to the statutory penalty, it does apply to all claims for special damages, and operates not alone against the sender of the message, but against the receiver of it, where the message in question relates to the business of both parties and is a reply to a previous message sent by the receiver. Where the damage done to the latter by delay in delivering the message was in breaking up negotiations for the sale of cotton of a low grade and preventing a sale which would otherwise have been consummated, the measure of damages would be the difference between the price which would have been realized by the sale contemplated and the value of the same cotton on that day in the market; or if there was no market for such cotton at the place where stored, its value at the nearest market to that place at which it could be disposed of, together with the expense, if any, of transporting it thither. If it had then no market value anywhere the measure of damages would be the contract price less the best price which could afterwards be obtained for it on the first day it could be sold and the expense of holding it until that day. Presumptively, in the absence of proof to the contrary, cotton has some market value on every day in the year, and consequently a claim for damages in such a case as the present would be practicable and might reasonably be required within sixty days from the time the message was sent, delivery having been made on the following day. The evidence in this case does not show the contrary. This being so and no claim for damages having been presented within sixty days, no special damages were recoverable.

Judgment reversed with direction.

30 Clerk's Office, Supreme Court of Georgia.

ATLANTA, GA., *Nov.* 26, 1892.

I hereby certify that the foregoing page hereto attached contains a true copy of the decision of the supreme court of Georgia in the case therein stated as appears from the original now of file in this office.

Seal Supreme Court of the State of Georgia, 1845.

Witness my signature and the seal of said court, hereto affixed, the day and year above written.

Z. D. HARRISON, *Clerk.*

31 Supreme Court of the State of Georgia.

WESTERN UNION TELEGRAPH CO.
vs.
DAVID W. JAMES.

ATLANTA, GA., *Aug't* 27, 1892.

This case came before the court upon a transcript of the record from the superior court of Early county, and, after argument had, it is considered and adjudged by the court that the judgment of the court below be reversed because the court erred in not granting a new trial, but with direction that the plaintiff below have leave to write off his recovery for special damages, in which event the judgment thus modified will stand affirmed for the penalty and costs, not including the costs of this writ of error either in the court below or in this court, these costs being chargeable to him.

Bill of Costs.

Entering case	$6 00
Recording opinion	75
Sheriff fees	1 25
Remitter	2 00
	$10 00

32 Supreme Court of the State of Georgia.

CLERK'S OFFICE, ATLANTA, GA., *Sept.* 2*nd*, 1892.

I certify that the above is a true extract from the minutes of the supreme court of Georgia, and that Mess. Bigby, Reed & Berry paid the above bill of costs.

Witness my signature and the seal of said court affixed the day and year above written.

Z. D. HARRISS, *Clerk.*

Early Superior Court, Oct. Adjourned Term.

WESTERN UNION TELEGRAPH CO.
vs.
DAVID W. JAMES.

Nov. 14, 1892.

It is ordered and adjudged by the court that the judgment of the supreme court stated in the remittitur be made the judgment of this court. It is further ordered and adjudged that the Union Telegraph Company recover of David W. James fourteen $\frac{41}{100}$
33 dollars costs in this court, and the further sum of ten dollars costs in the supreme court, making the sum of twenty-four $\frac{41}{100}$ dollars in all; and the plaintiff having in open court written off from his judgment the amount of special damages, it is ordered that the former judgment stand affirmed for the penalty and costs of the case in the superior court, and that plaintiff do have issued *fi. fa.* against the defendant for said penalty and costs named in the original judgment of this court.

J. H. GUERRY,
J. S. C., P. C.

Superior Court, Early Co., Georgia.

CLERK'S OFFICE, BLAKELY, GEORGIA.

Seal Clerk's Office, Superior Court, Early County, Ga.

I certify that the above and foregoing three pages are a true extract from the minutes of the superior court of Early county, Georgia.

Given under my official signature and seal of office this Nov. 24th, 1892.

J. W. ALEXANDER, *Clerk.*

34 Filed in clerk's office, supreme court of Georgia, Dec. 16th, 1892.

Z. D. HARRISON,
Cl'k S. C., Ga.

[Endorsed:] Transcript of Early superior ct. record.

35 CLERK'S OFFICE, SUPREME COURT OF GEORGIA,
ATLANTA, GA., *December* 21, 1892.

I hereby certify that the foregoing pages hereto attached contain the complete record in the case therein stated, said record consisting of—

The original writ of error.
Original citation.
Copy of the petition and prayer for reversal.
Copy of the bond.
Copy of the assignment of errors.
Copy of the bill of exceptions.

Copy of the transcript of record.
Copy of the judgment of the supreme court.
Copy of the decision of the supreme court, and
The transcript from Early superior court showing final judgment.

Witness my signature and the seal of said court, hereto affixed, the day and year above written.

[Seal Supreme Court of the State of Georgia, 1845.]

Z. D. HARRISON, *Clerk.*

Endorsed on cover: Case No. 15,240. Georgia supreme court. Term No., 206. The Western Union Telegraph Company, plaintiff in error, *vs.* David W. James. Filed January 6, 1893.